FILED

No. 961989 APR 28 1997

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

LOUIS E. OLIVERO & ASSOCIATES and DAVID W. OLIVERO,

Petitioners,

vs.

WESTERN STATES INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari from the Appellate Court of Illinois, Third Judicial District

PETITION FOR A WRIT OF CERTIORARI

LOUIS E. OLIVERO*
LOUIS E. OLIVERO & ASSOCIATES
1615 Fourth Street
Peru, Illinois 61354
(815) 224-2400

* *Counsel of Record*

60 pp

QUESTIONS PRESENTED FOR REVIEW

I. This Court, in *Taylor v. Freeland & Kronz* (1992), 503 U.S. 638, addressed the consequences of a creditor's tardy objection to the exemptions claimed by a debtor, and specifically held that, after a debtor declares property as "exempt" in a bankruptcy petition, the procedure established under 11 U.S.C. § 522(*l*) and Bankruptcy Rule 4003(b) requires a creditor to adhere to strict time limitations in seeking to preserve their claim to those assets which the debtor has exempted from the reach of creditors. However, the Illinois Appellate Court, Third Judicial District, issued an opinion and failed to apply the principles this Court established in *Taylor*. Specifically, the Illinois Appellate Court failed to follow *Taylor* in that it:

A. Entered judgment in favor of the plaintiff for its claim for subrogation against the defendants, who had represented the plaintiff's insureds, Gaylon and Judy Irvin, in their personal injury claim. Gaylon and Judy Irvin filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code before the settlement proceeds were disbursed.[1]

---

[1] The three parties in this appeal: the plaintiff, WESTERN STATES INSURANCE COMPANY, and the two defendants, LOUIS E. OLIVERO & ASSOCIATES, a law firm concentrating the practice of plaintiff's personal injury litigation, and DAVID W. OLIVERO, an associate attorney employed by the defendant law firm, participated in all of the state court proceedings in the Illinois Supreme Court, the Appellate Court of Illinois, Third District, and the Illinois Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, Illinois.

Specifically, the captioned proceeding arises out of a personal injury action the defendant attorney and law firm handled for two clients, GAYLON and JUDY IRVIN in the Illinois Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, Illinois, entitled *Judy Irvin and Gaylon Irvin v. Sharon Gualandi* , Case No. 91-L-91.

After settlement of the *Irvin v. Gualandi* action, but before Defendants could disburse the proceeds from their trust account, GAYLON and JUDY IRVIN, with the assistance of a new attorney STEPHEN J. WEST, filed a Chapter 7 Bankruptcy action in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, *In re: the Bankruptcy of Gaylon E. Irvin and Judy A. Irvin* and claimed an exemption for their personal injury settlement funds under Chapter 735 of the Illinois Compiled Statutes, § 5/12-1001(h)(4). United States Bankruptcy Court Trustee THOMAS B. SULLIVAN was assigned to the debtors' case and pursuant to the United States Bankruptcy Code, 11 U.S.C. § 341 convened a Meeting of Creditors on July 20, 1995. No objections were filed to the IRVIN petition. An order of discharge was entered by the Honorable Jack B. Schmetterer.

B. Reversed the trial court's order entered against the plaintiff and failed to consider that plaintiff completely disregarded the statutory procedure outlined in 11 U.S.C. § 522(*l*) and Bankruptcy Rule 4003(b), failed to file an appearance in the bankruptcy proceedings instituted by its insureds, and neglected to object to the property claimed as exempt by Gaylon and Judy Irvin.

C. Permitted the plaintiff to recover its subrogation claim against Gaylon and Judy Irvin by requiring Defendants to pay the subrogation claim although Mr. and Mrs. Irvin filed a Chapter 7 Bankruptcy action and claimed as exempt property their personal injury settlement funds under Chapter 735 of the Illinois Compiled Statutes, § 5/12-1001(h)(4).

II. Illinois, in accordance with the authority given to individual states under the United States Bankruptcy Code to apply their own exemption schemes, enacted Chapter 735 of the Illinois Compiled Statutes, § 5/12-1001(h)(4), allowing individual debtors to exempt property from the reach of creditors. The Illinois Appellate Court, Third District, failed to adhere to the Federal Bankruptcy Code's provision allowing a debtor's right to claim as exempt property funds received from a personal injury settlement. After deducting Defendant's fees and costs for satisfaction of their attorney's lien from the $20,000.00 from the settlement in *Irvin v. Gualandi,* the balance of the funds having been exempted from creditors' claims were disbursed by Defendants to Gaylon and Judy Irvin. The Illinois Appellate Court, Third District, failed to perceive the balance of the $20,000.00 settlement Gaylon and Judy Irvin received was exempt under 735 ILCS § 5/12-1001(h)(4). The Illinois Appellate Court, Third District, reversed the trial court and ordered Defendants to pay Plaintiff the subrogation claim which had been discharged by the United States Bankruptcy Court.

III. The Illinois Appellate Court, Third District incorrectly based its opinion upon *In re Squyres* (1994), 172 B.R. 592. The *Squyres* holding does not authorize an insurance carrier possessing a subrogation lien to enforce its claim against the individual attorneys who represent the insured in obtaining a personal injury settlement. The creditor-insurance carrier in *Squyres* appeared in the United States Bankruptcy Court and objected to the proposed distribution of settlement funds debtor received from a lawsuit resulting from a personal injury settlement.

IV. The only funds Defendants retained from the *Irvin v. Gualandi* settlement were to satisfy their attorney's lien. The opinion of the Illinois Appellate Court, Third District, holding that Defendants converted the Plaintiff's funds is inconsistent with Federal Bankruptcy law because an attorney's lien is a statutory lien and non-dischargeable under § 522(f)(1). The United States Bankruptcy Court *In re Whitford* (Bkrtcy. S.D. Ill. 1989), 101 B.R. 559, recognized that bankrupt debtors may not discharge an attorney's lien against settlement proceeds because such liens originate under state statutes. Defendants were entitled to have their lien satisfied with funds from the *Irvin v. Gualandi* settlement and claimed only property to which they were entitled; therefore, no conversion of funds ever occurred. Defendants could not legally have converted any property belonging to Plaintiff. No legal basis exists under tort or contract law to answer or pay for the debt of another; however, the opinion of the Illinois Appellate Court, Third District, holds otherwise.

V. Clarification from this court on the question whether insurance carriers possessing subrogation claims are in fact given special status and are permitted to disregard the procedure of 11 U.S.C. § 522(*l*) and Bankruptcy Rule 4003(b) established for creditors seeking to preserve claims to bankrupt debtors' assets exempted from their estates. If this decision is permitted to stand, and insurance company with a subrogation

claim against a debtor who exempts his personal injury settlement will be permitted to ignore proceedings of the Bankruptcy Court, and subsequently sue the personal injury attorney who disbursed settlement funds by alleging a conversion. The Illinois Appellate Court, Third District, decision clearly permits an insurance company to ignore the debtor with whom it contracted and simply sue a debtor's personal injury attorney for conversion.

TABLE OF CONTENTS

Page

Table of Authorities 6
Orders and Opinions Issued in Courts Below 7
Grounds for United States Supreme Court to Exercise its Jurisdiction in Case 8
Statement of the Case 13
Argument 19
Appendix . . . . . App. 1

TABLE OF AUTHORITIES

Cases:

Taylor v. Freeland & Kronz (1992), 503 U.S. 638. 2
In re Squyres (1994), 172 B.R. 592 4
In re Whitford (Bkrtcy. S.D. Ill. 1989), 101 B.R. 559 5
Chicago & Eastern Illinois Railroad Co. v. Industrial Commission, 284 U.S. 296 10
Ginley v. Blue Cross and Blue Shield of Ohio (Bankr. N. D. Ohio 1994), 174 B.R. 260 20
Matter of Yankel (D. Ariz. 1989), 97 B.R. 580 20

Statutes:

11 U.S.C., § 522(l) 2
Illinois Compiled Statutes, Chapter 735, § 5/12-1001(h)(4) . . . 4
11 U.S.C. § 522(*f*) 5
11 U.S.C., § 522(d) 9
770 ILCS 5/1 13

Court Rules:

Bankruptcy Rules and Official Forms, Rule 4003(b) 2
Rules of Practice of the Supreme Court of the United States, Rule 10.1.(c) 9
Illinois Supreme Court Rules, Rule 315 9

Professional Ethical Regulations:

Illinois Rules of Professional Conduct, Rule 1.15(a) 11

ORDERS AND OPINIONS ISSUED IN COURTS BELOW

The Illinois Supreme Court's order of January 29, 1997, denying Defendants LOUIS E. OLIVERO & ASSOCIATES and DAVID W. OLIVERO leave to appeal disposed of the case in a summary fashion. A copy of said order, which has yet to be announced in publication is included in Section A of the Appendix hereto.

The modified opinion issued by the Appellate Court of Illinois, Third District, has been published at 283 Ill.App.3d 307, 218 Ill.Dec. 836, 670 N.E.2d 333, and appears in Section B of the Appendix.

The opinion issued by the Appellate Court of Illinois, Third District, on August 29, 1997, prior to being modified on denial of rehearing was withdrawn from publication, a copy thereof is provided in Section C of the Appendix.

A copy of the written order entered by the Honorable William R. Banich, Illinois Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, Illinois, together with a copy of the transcript of his oral statements and rulings on the case are included in Sections D and E of the Appendix.

GROUNDS FOR UNITED STATES SUPREME COURT TO EXERCISE ITS JURISDICTION IN CASE

This appeal arises from the denial by the Illinois Supreme Court on January 29, 1997, of the Petition for Leave to Appeal submitted by Defendants LOUIS E. OLIVERO & ASSOCIATES and DAVID W. OLIVERO, and allowing the October 2, 1996, modified opinion of the Illinois Appellate Court to stand.

The October 2, 1996, modified opinion of the Illinois Appellate Court resulted from Defendants' Petition for Rehearing and replaced the court's August 29, 1996, opinion. The Appellate Court reversed the summary judgment order entered by the trial court in favor of the Defendants on February 5, 1996. Prior to authorizing the disbursement of their personal

injury settlement funds, Gaylon and Judy Irvin, had filed a bankruptcy petition seeking to discharge the plaintiff's subrogation claim.

In the Bankruptcy Court proceeding, Gaylon and Judy Irvin availed themselves of the exemption allowed regarding the personal injury settlement funds under the Federal Bankruptcy Code, 11 United States Code, § 522(d)(11)(D), and also recognized in Chapter 735 of the Illinois Compiled Statutes, § 5/12-1001(h)(4). Plaintiff received notice of the *Irvin* bankruptcy petition. However, Plaintiff disregarded the statutory procedure outlined in 11 U.S.C. § 522(*l*) and Bankruptcy Rule 4003(b), failed to file an appearance in the *Irvin* bankruptcy proceedings, and neglected to object to the property Gaylon and Judy Irvin listed as exempt.

The Illinois Appellate Court, Third District, reversed the trial court order and entered summary judgment in favor of the Plaintiff without requiring an evidentiary hearing as to the merits of Plaintiff's claim. The decision of the Illinois Appellate Court stands in direct conflict with *Taylor v. Freeland & Kronz* (1992), 503 U.S. 638, which addressed the consequences of a creditor's tardy objection to a debtor's claimed exemptions, and specifically held that 11 U.S.C. § 522(*l*) and Bankruptcy Rule 4003(b) establish a procedure which requires creditors to adhere to strict time limitations in order to preserve their interest in assets a debtor claims as exempt.

Clearly, the Illinois Appellate Court's misunderstanding of federal bankruptcy law is precisely the basis for this court to exercise its jurisdiction pursuant to Rule 10.1.(c) of the *Rules of Practice of the Supreme Court of the United States* because a state appellate court has effectively overruled *Taylor*, *supra*. This court has jurisdiction to accept this appeal because of the fact that the Illinois Supreme Court, in exercising its discretion under Rule 315(c) of the *Illinois Supreme Court Rules*, declined to accept the defendants' Petition for Leave to Appeal. Defendants have now exhausted the remedies available for review under Illinois procedural rules. This case is similar to *Chicago & Eastern Illinois Railroad Co. v. Industrial Commission*, 284 U.S. 296, where this Court held certiorari from the Circuit Court was proper after the Illinois Supreme Court declined to review that case.

STATUTES AND REGULATIONS INVOLVED

Rule 10.1.(c) of the *Rules of Practice of the Supreme Court of the United States*, provides:

> .1. A review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> * * *
>
> (b) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be decided by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The United States Bankruptcy Code, Chapter 11 United States Code, § 522(*l*) provides:

> The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section . . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt.

The Federal Rules of Bankruptcy Procedure provide in Rule 4003(b):

> The trustee or any other creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list, unless within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and person filing the list and the attorney for such person.

The United States Bankruptcy Code, Chapter 11 United States Code, § 522(d)(11)(D) provides:

(d) The following property may be exempted under subsection (b)(1) of this section:

(11) The debtor's right to receive, or property that is traceable to —

(D) a payment, not to exceed $7,500, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; . . .

Chapter 735 of the Illinois Compiled Statutes, § 5/12-1001(h)(4), provides:

The following personal property, owned by the debtor, is exempt from judgment, attachment, or distress for rent:

* * *

(h) The debtor's right to receive, or property that is traceable to:

* * *

(4) a payment, not to exceed $7,500 in value, on account of personal bodily injury of the debtor an individual of whom the debtor was a dependent.

Rule 1.15(a) of the Illinois Rules of Professional Conduct provides:

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account.

Rule 315 of the *Illinois Supreme Court Rules*, provides:

> [A] petition for leave to appeal to the Supreme Court from the Appellate Court may be filed by any party, including the State, in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: The general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

The United States Bankruptcy Code, Chapter 11 United States Code, § 522(f) provides:

> Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is —
>
> (1) a judicial lien; or
>
> (2) a nonpossessory, nonpurchase-money security interest in any —
>
> (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
>
> (B) implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor; or
>
> (C) professionally prescribed health aids for the debtor or a dependent of the debtor.

Chapter 770 of the Illinois Compiled Statutes, § 5/1 provides:

> Attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages, which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such suits, claims, demands or causes of action, plus costs and expenses. To enforce such lien, such attorneys shall serve notice in writing, which service may be made by registered or certified mail, upon the party against whom their clients may have such suits, claims or causes of actions, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action. Such lien shall attach to any verdict, judgment or order entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the notice. On petition filed by such attorneys or their clients any court of competent jurisdiction shall, on not less than 5 days' notice to the adverse party, adjudicate the rights of the parties and enforce the lien.

STATEMENT OF THE CASE

Gaylon and Judy Irvin received injuries as the result of Sharon Gualandi striking the Irvin car. Shortly after the accident, Gaylon and Judy Irvin retained Defendants David Olivero and the law firm of Louis E. Olivero & Associates to represent them in pursuing a claim for the personal injuries they suffered in the aforementioned car accident.

At the time of their automobile accident, Gaylon and Judy Irvin were insured with Western States Insurance Co. and pursuant to the terms of that policy Plaintiff paid a portion of Gaylon and Judy Irvin's medical bills totalling $3,361.80 (C. 92, 93). After learning Defendants represented Gaylon and Judy Irvin, the plaintiff insurance company contacted Defendants by way of letter dated April 18, 1991, advising that they were <u>not</u> agents of the company and in their letter stated:

> This will serve you notice that we fail and refuse to authorize, retain or engage your services or efforts in the collection of our subrogation interests under said coverage of our policy or otherwise to authorize you to act on our behalf, real or apparent, express or implied, or in any manner whatsoever. (Emphasis added)

On August 17, 1993, Plaintiff again contacted Defendants and indicated that for the medical payments made to Gaylon and Judy Irvin it claimed, "[R]eimbursement in full from . . . Farmers Insurance Group," and stated it would "continue to seek reimbursement on our own."

After Gaylon and Judy Irvin agreed to settle their claim against Sharon Gualandi for $10,000.00 to each claimant, or a total of $20,000.00, Defendants encountered difficulty getting their clients' cooperation after advising them of the total amount of liens claimed against their settlement.

Eventually, Western States agreed to reduce its claim to $2,005.20. The settlement checks issued by Tortfeasor Gualandi's insurance carrier in *Irvin v. Gualandi* listed four payees and all four payees properly endorsed the check. In conformity with Rule 1.15(a) of the Illinois Rules of Professional Conduct, the check was deposited by Defendants in their trust account. However, Gaylon and Judy Irvin, through new legal counsel, elected to file for bankruptcy protection from their creditors.

Although Defendants had prepared a settlement statement and written the requisite checks for disbursing the funds, the checks were never negotiated. The debtors, Gaylon and Judy Irvin, refused to provide the requisite endorsements and elected to file bankruptcy. Defendants had no authority to issue trust funds without the approval of Gaylon and Judy Irvin.

After the Irvins' petition for bankruptcy had been filed, notice was given to Plaintiff as well as all listed creditors by the Clerk of the Bankruptcy Court. The pending bankruptcy petition filed by Gaylon and Judy Irvin requested discharge of any and all debts owed to and/or subrogation liens claimed by Plaintiff as well all other creditors.

When the Irvins filed their petition, they claimed as an exemption the settlement funds from their personal injury action under Chapter 735 of the Illinois Compiled Statutes, § 5/12-1001(h)(4).

Title 11 U.S.C. § 522(*l*) and Bankruptcy Rule 4003(b) outline the applicable procedure, and this Court in *Taylor v. Freeland & Kronz* (1992), 503 U.S. 638, mandated strict compliance with the Code and rules by a creditor seeking to contest and challenge the validity of a bankrupt debtor's claimed property exemptions. Nevertheless, Western States disregarded the holding in *Taylor* and neglected to follow the statutory procedure, failed to file an appearance in the bankruptcy proceedings, and failed to object to the property declared as exempt.

Bankruptcy Trustee Thomas B. Sullivan convened a Meeting of Creditors for Gaylon and Judy Irvin's case on July 20, 1995 (C. 80). At the first Meeting of Creditors, the trustee considered the following factors: the exemption for a personal injury award claimed by the debtors; debtors' lack of any other assets; and the lien against the balance of the Irvin settlement for attorney fees and costs. The trustee considered the debtors' assets and liabilities, found they presented a no assets case, set aside Plaintiff's subrogation claim along with other liens against the debtors' personal injury settlement, and permitted disbursement of the funds.

After the Meeting of Creditors, Gaylon and Judy Irvin were granted a discharge from all their debts. Defendants disbursed the net proceeds of the personal injury settlement to Gaylon and Judy Irvin.. Because Western States failed to follow the requisite procedure mandated by this Court in *Taylor* and as outlined in 11 U.S.C. § 522(*l*) and Bankruptcy Rule 4003(b), any subrogation rights Plaintiff claimed against Gaylon and Judy Irvin were extinguished by the Bankruptcy Court's Order of Discharge.

Western States disregarded each and every procedural step established by the United States Bankruptcy Code and the rules of the Bankruptcy Court. Having failed to object to the bankrupt debtors' declared exemption of the settlement funds received and after neglecting the other procedural rules, Western States decided to sue Defendants: the attorney who represented the Irvins in obtaining the personal injury settlement and his

law firm. This was an attempt by Western States to shift the collection of funds to satisfy its subrogation claim from Gaylon Irvin and Judy Irvin, who had discharged the claim in bankruptcy, to the legal counsel who represented the personal injury claimants. Western States never presented any legal theory under tort or contract law which would give it the right to sue the attorney and law firm who represented Gaylon Irvin and Judy Irvin in the *Irvin v. Gualandi* personal injury action.

The trial judge which heard the case in the circuit court, ruled in Defendants' favor, and denied the Plaintiff's Motion for Summary Judgment. However, on appeal the Illinois Appellate Court, Third District, reversed the trial court and ordered that summary judgment be entered as a matter of law against the Defendants. Thus, Plaintiff was permitted to collect from the debtors' settlement proceeds by bringing a conversion action against the debtors' attorney in state court. With this ruling the Illinois Appellate Court, Third District, fashioned a new cause of action which has never heretofore existed under any civil or criminal theory in American jurisprudence.

DEFENDANTS' PRESENTATION AND ARGUMENT IN ILLINOIS TRIAL AND APPELLATE COURTS AS TO APPLICATION OF FEDERAL BANKRUPTCY LAW.

Throughout all stages of the litigation in the case at bar, Defendants have vigorously argued that the discharge granted by the Bankruptcy Court to their former clients, Gaylon and Judy Irvin, precluded Western States from proceeding against them in an effort to collect on a discharged subrogation claim. Immediately after being served with summons, Defendants entered their appearance in the trial court and moved to dismiss the Complaint filed by Western States stating as follows:

> 3. On February 3, 1995, the clients settled their personal injury cases for $10,000.00 per person. Since the medical liens in their case exceeded the amount of the settlement, the lienholder were asked to take a reduction in their liens. The plaintiff agreed to accept $2,005.20 for its lien.

4. On June 20, 1995, before any disbursement was made to the lienholder, clients retained Attorney Stephen West and filed Chapter 7 Bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division in cause No. 95-B-12506. The clients listed the plaintiff, WESTERN STATES INSURANCE COMPANY, as a creditor for the medical bills plaintiff paid under its policy of insurance with clients.

5. The plaintiff, WESTERN STATES INSURANCE COMPANY, received notice of clients' bankruptcy petition and plaintiff was provided with an opportunity to object to its claim being discharged.

6. The plaintiff's claim for reimbursement was discharged by the bankruptcy court . . . .

Although, the trial court denied that motion, Defendants continued to argue their former clients' bankruptcy discharged Western States' claim and explained the facts in their Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment, calling attention to Plaintiff's failure to appear in the United States Bankruptcy Court and its failure to object to the petition:

On June 20, 1995, Gaylon and Judy Irvin filed for bankruptcy protection and listed . . . Western States as creditors. (Exhibit "A".) Notice of the joint bankruptcy was sent to Western States, along with the notice of the Meeting of Creditors scheduled for July 20, 1995. (Exhibit "A".)

On July 12, 1995, David W. Olivero notified Western States that Gaylon and Judy Irvin had filed bankruptcy and if they had any questions, they were to contact Attorney Stephen West.

On July 20, 1995, Gaylon and Judy Irvin, along with Attorney Stephen West, met with the bankruptcy trustee at the

> Meeting of Creditors. No representative for . . . Western Statesappeared at the meeting. The bankruptcy trustee set aside . . . Western States' claim. (Exhibits "A", "B" & "C".)

In their motion, Defendants also noted that Gaylon and Judy Irvin exempted a major portion of the *Irvin v. Gualandi* settlement funds they received.

> After the Illinois Appellate Court, Third District, reversed the trial court and entered judgment in favor of Plaintiff, Defendants petitioned for a rehearing drawing that court's attention to the precedential decision of *Taylor*, *supra*.
>
> Gaylon and Judy Irvin sought relief from their creditors by filing bankruptcy under Title 11 of the United States Code. When the Irvin's filed their petition for bankruptcy, the property belonging to them, with the exception of certain exempt property, became part of their estate to be liquidated (11 U.S.C. §522.)
>
> One of the exemptions recognized by Federal law and Illinois law is funds received from a personal injury settlement. Gaylon and Judy Irvin elected to exempt up to $7,500.00 of their personal injury settlement under the Illinois Code of Civil Procedure, 735 ILCS 5/12-1001. Western States, along with all of Gaylon and Judy Irvin's creditors had a right to oppose this exemption under Bankruptcy Rule 4003.
>
> Western States did not file an objection to Gaylon and Judy Irvin's bankruptcy petition, nor did it appear at the Meeting of Creditors. Western States could not have received any money from Gaylon and Judy Irvin before they filed bankruptcy on June 20, 1995 because the United States Trustee could avoid, as a preference, any transfer of property to or for the benefit of a creditor that was made on or within 90 days before the date of the filing of the petition (11 U.S.C. 547(b).)

As previously referred to in this petition, the trial court entered judgment in Defendants' favor and against Western States Insurance Company *(See order in sections D and transcript in section E of the Appendix hereto)*. When Plaintiff appealed to the Illinois Appellate Court, Third District, Defendants continued to argue that it failed to protect its subrogation rights when it did not appear in the United States Bankruptcy Court. Defendants distinguished the *Ginley v. Blue Cross and Blue Shield of Ohio* (Bankr. N.D. Ohio 1994), 174 B.R. 260; *In re Squyres* (1994), 172 B.R. 592; and *Matter of Yankel* (D. Ariz. 1989), 97 B.R. 580 cases Western States cited as precedent.

After the Illinois Appellate Court on August 29, 1996, reversed the trial court's decision *(See text of August 29, 1996 opinion printed in section C of the Appendix)*, Defendants petitioned for a rehearing of the case in light of this court's *Taylor* decision. When it declined to reverse its judgment against Defendants *(See the Illinois Appellate Court's modified opinion in section B of the Appendix)*, they petitioned the Illinois Supreme Court to consider the case. Again Defendants requested a reversal of the decision by the Illinois Appellate Court, in light of the controlling precedent of the *Taylor* decision and a detailed explanation of applicable bankruptcy law.

The Illinois Supreme Court declined to consider the case *(See January 29, 1997, order in Section A of the Appendix)*. The only forum for review of the Federal questions raised by the bankruptcy petition filed by Gaylon and Judy Irvin remains with the United States Supreme Court.

ARGUMENT

I.

IN BANKRUPTCY COURT, AFTER A DEBTOR DECLARES PROPERTY AS "EXEMPT," THE PROCEDURE ESTABLISHED UNDER 11 U.S.C. § 522(*l*) AND BANKRUPTCY RULE 4003(b) REQUIRES CREDITORS TO ADHERE TO STRICT TIME LIMITATIONS IN SEEKING TO PRESERVE A CLAIM TO AN ASSET WHICH A DEBTOR CLAIMED AS EXEMPT.

11 U.S.C., § 522(*l*) of the Bankruptcy Code, sets forth the procedure which bankrupt debtors must follow in exempting property from their bankruptcy estates. The section also sets forth the consequences of a creditor's failure to act. Specifically, 11 U.S.C. § 522(*l*), provides as follows:

> The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section . . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt. (Emphasis added.)

Rule 4003(b) of the Federal Rules of Bankruptcy Procedure sets forth both the time schedule and the procedure for a creditor, such as Plaintiff, to contest the exemptions claimed by a bankrupt debtor. Rule 4003(b) expressly provides:

> The trustee or any other creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list, unless within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and person filing the list and the attorney for such person. (Emphasis added.)

A.

THIS COURT'S RECOGNITION IN *Taylor v. Freeland & Kronz*, THAT STRICT PROCEDURE FOUND IN 11 U.S.C. § 522(*l*) AND BANKRUPTCY RULE 4003(b), ARE MANDATORY AND A CREDITOR'S FAILURE TO PRESENT TIMELY OBJECTIONS TO PROPERTY A DEBTOR CLAIMS AS EXEMPT OPERATES AS AN ESTOPPEL AGAINST SUCH A CREDITOR IN ANY STATE COURT PROCEEDING.

The language of Rule 4003(b) clearly requires that any creditor with objections to the property claimed as exempt by each debtor must file their

objections in the time frame set forth by the rule. Specifically, in *Taylor* the bankrupt debtor, who was a plaintiff in a pending employment discrimination suit, claimed all proceeds from her injury litigation as exempt property in her bankruptcy petition. *Id.* at 640.

The *Taylor* facts thus closely parallel the events in the case at bar where Defendants' clients, Gaylon and Judy Irvin, filed for bankruptcy and claimed an exemption under Chapter 735 of the Illinois Compiled Statutes, § 5/12-1001(b)(4), the settlement funds they received in their personal injury settlement. Chapter 735 of the Illinois Compiled Statutes, § 5/12-1001 (b)(4), expressly provides:

> The personal property exemptions set forth in this Section shall apply only to individuals and only to personal property that is used for personal rather than business purposes. (Emphasis added.)

This statute entitles the debtors, Gaylon and Judy Irvin, to exempt money received in a personal injury settlement from their creditors, and designates the length of time in which creditors, such as Western States, could legitimately object.

In *Taylor,* after the time had expired for objecting to the debtor's claimed exemption of property, the trustee, acting on behalf of the creditors listed in debtor's petition, filed suit against debtor's attorney demanding payment from the exempted property. In its analysis of the applicable section of the Bankruptcy Code, this Honorable Court in *Taylor* began by stating:

> Section 522(*l*) of the Bankruptcy Code requires a debtor to file a list of property that the debtor claims as statutorily exempt from distribution to creditors. Federal Rule of Bankruptcy Procedure 4003 affords creditors and the bankruptcy trustee 30 days to object to claimed exemptions. We must decide . . . the validity of an exemption after the 30-day period . . . . (Emphasis added.)

Id. at 639. In the case at bar, as in *Taylor*, after the time expired for filing objections in the Bankruptcy Court, Plaintiff sought to be paid by suing the attorneys who had represented the Irvins in obtaining a settlement of their personal injury claim against Sharon Gualandi.

In *Taylor*, the United States Supreme Court proceeded to analyze 11 U.S.C. § 522(*l*) and Bankruptcy Rule 4003(b) and stated:

> When a debtor files a bankruptcy petition, all of his property becomes part of a bankruptcy estate. See 11 U.S.C. § 541. The Code, however, allows the debtor to prevent the distribution of certain property by claiming it as exempt. Section 522(b) allowed [Debtor] to choose the exemptions afforded by state law or the federal exemptions listed in § 522(d). Section 522(*l*) states the procedure for claiming exemptions and objecting to claimed exemptions . . . . Although § 522(*l*) itself does not specify the time for objecting to a claimed exemption, Federal Rule of Bankruptcy Procedure 4003(b) provides in part:
>
> > "The trustee or any other creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) . . . ." (Emphasis added.)

Id. at 642.

In applying these provisions, the *Taylor* court stated:

> [The trustee], as a result, apparently could have made a valid objection under § 522(*l*) and Rule 4003 if he had acted promptly. We hold, however, that his failure to do so prevents him from challenging the validity of the exemption now. (Emphasis added.)

Id. In the case at bar, Western States failed to make timely objections under Rule 4003(b) to the exemption Gaylon Irvin and Judy Irvin claimed of the proceeds received by way of a settlement of their personal injury suit.

Because Western States, after receiving notice of the bankruptcy petition filed by Mr. and Mrs. Irvin, failed to object to the exemption of the personal injury proceeds claimed in the Bankruptcy Court by the Irvins, the United States Bankruptcy Court discharged Gaylon and Judy Irvin from payment of any financial claim asserted by Western States Insurance. Any subrogation rights Western States may have had against Gaylon and Judy Irvin were extinguished because the company disregarded the established procedure in Rule 4003(b). Plaintiff could have made an objection under § 522(*l*) and Rule 4003(b); however, because Plaintiff failed to comply with these provisions it is now prevented from challenging the validity and effect of the Bankruptcy Court's discharge of its subrogation rights against Gaylon and Judy Irvin. Under the doctrine of estoppel by verdict Plaintiff is prevented from proceeding against the Defendants in a state court proceeding.

The holding in *Taylor* stands in direct contrast to the Appellate Court's erroneous conclusion:

> The defendants have cited no authority to support for proposition that their liability to Western States was affected by Western States' failure to attend the creditors meeting or the discharge of the Irvins' debts by the bankruptcy court.

See, Modified Opinion issued, October 2, 1996, p. 6.

In the present case, the record is clear that Western States did absolutely nothing when the trustee convened a Meeting of Creditors in Gaylon and Judy Irvin's bankruptcy case (C. 80). Rather, Western States chose not to object either to the discharge of its subrogation claim, or to the property exemption claimed by the Irvins.

The trustee for the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, at the aforementioned Meeting of Creditors held *In re: the Bankruptcy of Gaylon E. Irvin and Judy A. Irvin*, examined the debtors, made his findings as to Gaylon and Judy Irvin's financial resources, and declared their petition presented a "no asset" case.

More than thirty days after the Meeting of Creditors in the Bankruptcy Court, Plaintiff filed in state court a claim to the settlement funds against Defendants, not against the Irvins. No duty ever existed between Western States and Defendants. Western States, to properly protect its subrogation claim, should have followed the practice as outlined in the Bankruptcy Code and bankruptcy rules and appeared before the Bankruptcy Court to present objections to the property claimed as exempt as well as the discharge of Gaylon and Judy Irvin. Because Plaintiff neglected and failed to follow the requirements in the Bankruptcy Code and the bankruptcy practice rules the trial court properly ruled that Western States could not recover against Defendants and granted summary judgment in favor of Defendants.

B.

THE CREDITOR-INSURANCE CARRIER WHICH SOUGHT TO ENFORCE A SUBROGATION LIEN AND INITIATED THE LITIGATION IN THE *In re Squyres* CASE, UNLIKE PLAINTIFF INSURER, APPEARED IN THE UNITED STATES BANKRUPTCY COURT AND OBJECTED TO THE PROPOSED DISTRIBUTION OF SETTLEMENT FUNDS DEBTOR RECEIVED FROM A LAWSUIT RESULTING FROM AN AUTOMOBILE ACCIDENT.

When the Illinois Appellate Court, Third District, relied upon *In re Squyres*, 172 B.R. 592, 595 (1994), as precedent for its August 29, 1996, opinion, it overlooked a critical aspect of that case as compared with the case at bar. In *Squyres*, the bankruptcy trustee sought court approval from the United States Bankruptcy Court. *Squyres* did not involve a creditor

claiming a subrogation interest and suing the attorney who settled the debtor's personal injury action in state court.

The debtor in *Squyres* had been involved in an automobile accident and his insurance carrier, Farmers Automobile Insurance Association, paid the debtor's medical expenses of $7,788.05. After the debtor filed a Chapter 7 Bankruptcy proceeding, the trustee applied to the Bankruptcy Court and received authorization for the debtor's personal injury attorney to pursue a cause of action against the negligent party. After settlement of the debtor's personal injury claim, the trustee sought court approval for distributing the proceeds and Farmers Insurance appeared in the Bankruptcy Court and objected to the proposed distribution. Thus, the case of *Squyres* is distinguished from the case at bar because the debtor's insurer, claiming subrogation rights to the debtor's personal injury settlement funds, appeared in the Bankruptcy Court and objected to the proposed disposition of assets.

In the present case, the record is clear that Plaintiff did absolutely nothing when the trustee convened a Meeting of Creditors in Gaylon and Judy Irvin's bankruptcy case. Rather, Plaintiff chose not to object either to the discharge of its subrogation claim or to the property exemption claimed by the Irvins.

The trustee at the aforementioned Meeting of Creditors examined the debtors, made his findings as to Gaylon and Judy Irvin's financial resources, and declared their petition presented a "no asset" case. More than thirty days after the Meeting of Creditors in the Bankruptcy Court, Western States filed in state court a claim to the settlement funds. Plaintiff's lawsuit was not against the debtors who were discharged from payment of that debt. Instead, Western States chose to proceed against the attorneys who owed no duty whatsoever to Plaintiff, either under tort or contract law. The Plaintiff, to properly protect its subrogation claim, should have followed the practice as outlined in the Bankruptcy Code and practice rules. Because Plaintiff neglected and failed to follow the requirements in the Bankruptcy Code and the bankruptcy practice rules, the trial court properly ruled that Plaintiff could not recover against Defendants.

II.

THE *Squyres* OPINION DOES NOT AUTHORIZE AN INSURANCE CARRIER POSSESSING A SUBROGATION LIEN TO ENFORCE ITS CLAIM AGAINST THE ATTORNEY, WHO REPRESENTED THE INSURED IN OBTAINING THE SETTLEMENT.

The *Squyres* opinion, *supra*, which the Illinois Appellate Court cited as the basis for its October 2, 1996, opinion, only suggests that in a bankruptcy proceeding subrogation agreements might be enforced against debtors and bankruptcy trustees during Bankruptcy Court proceedings. Specifically, in *Squyres* the Bankruptcy Court explained:

> As conceded by the Trustee and the Debtor, subrogation clauses in insurance contracts are generally enforceable under Illinois law. *In re Estate of Scott*, 208 Ill.App.3d 846, 567 N.E.2d 605, 153 Ill.Dec.647 (2d Dist. 1991); *Powell v. Inghram*, 117 Ill.App.3d 895, 453 N.E.2d 1163, 73 Ill.Dec.174 (3d Dist. 1983). (Emphasis added.)

Squyres, at 594.

Clearly, nothing in the foregoing portion of the *Squyres* opinion suggests that an insurance company may enforce its subrogation claim, after that claim has been discharged by the Bankruptcy Court in an action, against the law firm and the attorney who represented the debtor in a separate personal injury claim settlement by filing a separate suit against the attorney in state court. The foregoing is important in light of the fact the Illinois Appellate Court, Third District, in its opinion modified on October 2, 1996, acknowledged the debtors, Gaylon and Judy Irvin, and not Defendants, had agreed to satisfy Plaintiff's subrogation claim. Specifically, this court stated:

> In the instant case, the Irvins executed a release which provided that they would satisfy Western States' claim . . . . (Emphasis added.)

See, Modified Opinion issued, October 2, 1996, p. 4. Thus, even the Appellate Court acknowledged that Defendants had no obligation, contractual or otherwise, to pay any sum on the subrogation claim of Western States Insurance Company.

III.

DEFENDANTS COMMITTED NO ACT OF CONVERSION BECAUSE THE ONLY FUNDS DEFENDANTS RETAINED FROM THE *Irvin v. Gualandi* SETTLEMENT MERELY SATISFIED A STATUTORY ATTORNEY'S LIEN WHICH THE UNITED STATES BANKRUPTCY COURTS HAVE RECOGNIZED AS AN OBLIGATION NOT DISCHARGEABLE BY THE DEBTORS AGAINST WHOM SUCH A LIEN IS CLAIMED.

The United States Bankruptcy Courts *In re Whitford* (Bkrtcy. S.D. Ill. 1989), 101 B.R. 559, recognized that bankrupt debtors may not discharge an attorney's lien against settlement proceeds since because liens originate under state statutes.

In *Whitford*, the United States Bankruptcy Court for the Southern District of Illinois considered whether the debtors could discharge in bankruptcy the attorney's lien claimed by the attorney who had represented them in the prosecution of an automobile accident personal injury claim. *Id.* at 560. The debtors claimed the attorney's lien was dischargeable under 11 U.S.C. § 522(*f*), but the Bankruptcy Court ruled otherwise and explained:

> Debtors argue that statutory liens are avoidable under the plain language of 11 U.S.C. § 522(*f*). However, this is not the case.
>
> * * *
>
> Debtors make no attempt to argue that section 522(*f*)(2) applies in the instant case. Section 522(*f*)(1), on its face, permits the avoidance of *judicial* liens rather than *statutory* liens. Debtors cite no authority in support of their novel position that section 522(*f*)(1) applies to statutory liens. Thus, the sole argument available to debtors—but not made by them—is that Mr.

> Douglas' lien for attorney fees is a judicial lien. Unfortunately for debtors, this also is not the case. (Emphasis in original with additional emphasis supplied.)

Id. at 561.

Because Defendants were entitled to have their lien satisfied with funds from the *Irvin v. Gualandi* settlement and only retained funds from said settlement in satisfaction of their lien under 770 ILCS 5/1, the decision rendered by the Illinois Appellate Court, Third District, holding that Defendants converted the Plaintiff's funds is entirely inconsistent *Whitford*, where an attorney's lien arising by statute is non-dischargeable. Defendants were entitled to have their lien satisfied and could not legally have converted any property from Plaintiff, no independent and adequate grounds exist under tort law for the decision rendered in this case by the Illinois Appellate Court, Third District.

CONCLUSION

Defendants respectfully pray this Honorable Court will grant this Petition for a Writ of Certiorari and correct the injustice resulting from the decision of the Illinois Appellate Court, Third District. The state court, by ignoring federal law and failing to apply the holding of this court in *Taylor*, permitted Western States to ignore the procedure established under Bankruptcy Rule 4003(b) and 11 U.S.C. § 522(*l*), which grants protection of a subrogation claim against insureds' settlement funds.

The holding of the decision of the Illinois Appellate Court, Third District, circumvents the Federal Bankruptcy Code and the *Taylor* opinion by allowing Western States to prosecute a claim in State Court against the debtors' former attorneys to collect a claim that has been discharged by a Bankruptcy Court.

As a consequence of the decision rendered by the Illinois Appellate Court, Third District, Western States and all other insurance carriers are now free to sue an attorney who represents an injured party and who

obtains a personal injury settlement in which they claim a subrogation lien, although their insured may have received a discharge from the Bankruptcy Court for the payment of the insurer's subrogation claim.

Respectfully Submitted,

LOUIS E. OLIVERO*
LOUIS E. OLIVERO & ASSOCIATES
1615 Fourth Street
Peru, Illinois 61354
(815) 224-2400
* *Counsel of Record for Appellees*

APPENDIX

A.

Order entered on January 29, 1997, by the Illinois Supreme Court provides as follows:

ILLINOIS SUPREME COURT
82207 JULEANN HORNYAK, CLERK
Supreme Court Building
Springfield, Illinois 62701
(217) 782-2035

January 29, 1997

Mr. Louis E. Olivero
Attorney at Law
1615 Fourth St.
Peru, IL 61354

No. 82207 - Western States Insurance Company, respondent, v. Louis E. Olivero & Associates et al., petitioners. Leave to Appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 20, 1997.

B.

The opinion issued by the Appellate Court of Illinois, Third District, as Modified on Denial of Rehearing on October 2, 1996, and now published at 283 Ill.App.3d 307, 218 Ill.Dec. 836, 670 N.E.2d 333, was delivered by the Honorable Peg Breslin, Presiding Justice, with the Honorable William E. Holdridge, Presiding Justice, and the Honorable Michael P. McCuskey, Justice, concurring therein. The aforementioned opinion provides as follows:

3-96-0170
Western States v. Olivero
MODIFIED OPINION FILED
October 2, 1996.

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord One Thousand Nine Hundred and Ninety Six, within and for the Third District of Illinois:

Present -

HONORABLE PEG BRESLIN, Presiding Justice	x
HONORABLE WILLIAM E. HOLDRIDGE, Presiding Justice	x
HONORABLE TOM M. LYTTON, Justice	
HONORABLE MICHAEL P. MC CUSKEY, Justice	x
HONORABLE KENT SLATER, Justice	
HONORABLE JOHN F. MICHELA, Justice	
GIST FLESHMAN, Clerk	

BE IT REMEMBERED, that afterwards on August 29, 1996 the Opinion of the Court was filed in the Clerk's Office of said court, in the words and figures following viz: MODIFIED OPINION FILED October 2, 1996.

No. 3--96--0170

IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 1996

WESTERN STATES INSURANCE COMPANY, Plaintiff-Appellant, v. LOUIS E. OLIVERO & ASSOCIATES and DAVID W. OLIVERO, Defendants-Appellees.	Appeal from the Circuit Court for the 13th Judicial Circuit LaSalle County, Illinois No 95 SC 1417 Honorable William R. Banich Judge, Presiding

MODIFIED UPON DENIAL OF REHEARING
PRESIDING JUSTICE BRESLIN delivered the opinion of the court:

The plaintiff, Western States Insurance Company (Western States), filed the instant case against the defendants, Louis E. Olivero & Associates and David Olivero, alleging that they wrongfully refused to satisfy Western States' claim for subrogation out of the proceeds of a settlement in a personal injury case. The trial court granted the defendants' motion for summary judgment. We hold that Western States was entitled to receive the amount of its subrogation claim from the proceeds of the settlement and that the defendants' failure to honor the subrogation claim amounted to a conversion of Western States' property. Accordingly, we reverse the court's order and grant summary judgment in favor of Western States.

Western States provided automobile insurance to Gaylon and Judy Irvin. After an automobile accident involving the Irvins and Sharon Gualandi, the Irvins retained the defendants to recover damages from Gualandi. The Irvins settled their claims for a total of $ 20,000. Under

Western States' insurance policy with the Irvins, Western States had a subrogation interest in the suit because it had paid for medical treatment received by the Irvins.

Before the settlement checks were issued, the Irvins executed a release which provided that they would satisfy all liens and claims against the settlement, including Western States' claim for medical payments. The settlement checks were made payable to, among others, the Irvins, Louis E. Olivero & Associates, and Western States. The defendants sent these checks to Western States for its endorsement. The letter which accompanied the checks provided that the defendants agreed to reimburse Western States in the amount of $ 2,005.20, and that a check would be forwarded as soon as the settlement checks cleared. Western States endorsed the checks and returned them to the defendants' office with a demand for payment of $ 2,005.20.

The defendants cashed the settlement checks and deposited the proceeds into a trust account. The checks cleared the bank on May 4, 1995, but the defendants never paid Western States its share of the proceeds. Then, on May 28, 1995, the Irvins informed David Olivero of their intent to file a bankruptcy petition. On June 1, the Irvins' bankruptcy attorney contacted Olivero and advised him not to disburse any of the settlement proceeds because the proceeds were property of the bankruptcy estate. Nevertheless, on the following day, the defendants disposed of the settlement proceeds by retaining $ 9,022.99 in attorney fees and costs and disbursing the remaining $ 10,977.01 to the Irvins. The Irvins did not file their bankruptcy petition until June 20.

In its complaint, Western States alleged, among other things, that the defendants had converted Western States' funds. Both parties filed motions for summary judgment. In granting summary judgment for the defendants, the trial court found that the conversion claim failed because the Irvins maintained control of the settlement proceeds. This appeal followed.

We will confine our discussion in this opinion to whether the trial

court erred by granting summary judgment for the defendants on Western States' conversion claim and by denying Western States' motion for summary judgment.

When parties file cross motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Andrews v. Cramer*, 256 Ill.App.3d 766, 769, 629 N.E.2d 133, 135, 195 Ill.Dec. 825 (1993). On appeal from the entry of summary judgment, the standard of review is de novo. *Andrews*, 256 Ill.App.3d at 769, 629 N.E.2d at 135.

To prevail on a conversion claim, a plaintiff must establish that (1) it has a right to the property; (2) it has an absolute and unconditional right to the immediate possession of the property; (3) it made a demand for possession and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over its property. *Springfield Rare Coin Galleries, Inc. v. Mileham*, 250 Ill.App.3d 922, 620 N.E.2d 479, 189 Ill.Dec. 511 (1993). Retention of property after a valid demand for its return constitutes conversion. *Harry W. Kuhn, Inc. v. State Farm Mutual Automobile Insurance Co.*, 201 Ill.App.3d 395, 559 N.E.2d 45, 147 Ill.Dec. 45 (1990).

In the instant case, the Irvins executed a release which provided that they would satisfy Western States' claim and the Irvins' insurance policy gave Western States the right to recover its medical payments from the personal injury settlement. Moreover, Western States was a named payee on the settlement checks and the defendants promised to pay Western States its share of the settlement amount as soon as the checks cleared the bank. Under these facts, Western States established that it had a right to its share of the proceeds and an absolute and unconditional right to the immediate possession of those proceeds after the checks cleared the bank. Western States made a demand for its share of the proceeds, but the defendants failed to comply with this demand after the checks had cleared. Because it is clear from the undisputed facts that the defendants were authorized to

hold Western States' share of the proceeds only until the checks cleared, the defendants' retention of the proceeds constituted a conversion.

The defendants excuse their actions, however, based upon the rule of professional conduct requiring attorneys to hold all property subject to a dispute (see 134 Ill.2d R. 1.15(a) and (c)). They also argue that they could only dispose of the Irvins' funds if directed to do so by them.

Before the settlement checks cleared, the defendants and the Irvins had recognized their obligation to honor Western States' subrogation claim. Therefore, the fact that Western States was entitled to receive $ 2,005.20 from the proceeds of the settlement checks was not subject to any dispute. In addition, under the Illinois Rules of Professional Conduct, the defendants had an affirmative duty to disburse Western States' share of the settlement proceeds. See 134 Ill. 2d R. 1.15(b). Accordingly, we reject the defendants' argument that the rules of professional conduct limited their duty to return Western States' share of the settlement proceeds.

The defendants also argue that Western States forfeited its right to pursue the subrogation claim by failing to attend a creditors meeting with the Irvins' bankruptcy trustee. They maintain that the amount owed to Western States was a debt which was discharged by the bankruptcy court. We disagree.

The filing of a bankruptcy petition creates an estate comprised of all property in which the debtor has a legal or equitable interest. See 11 U.S.C. § 541(a) (1994). An insurer with a valid subrogation claim has an equitable right to a portion of the debtor's recovery from a third party tortfeasor and the amount of the recovery that represents the costs expended by the insurer does not become part of the debtor's bankruptcy estate. *In re Squyres*, 172 Bankr. 592, 595 (1994). Since both the Irvins and the defendants had previously recognized their obligation to honor Western States' subrogation claim and Western States was a named payee on the settlement checks, the Irvins had no right or interest in Western States'

share of the settlement proceeds. Thus, Western States' share of the proceeds did not become part of the Irvins' bankruptcy estate and Western States was not obligated to attend the creditors meeting. In addition, Western States' subrogation claim was not a debt of the Irvins that could be discharged by the bankruptcy court. See *In re Squyres*, 172 Bankr. 592, 595 (1994).

Moreover, as discussed above, the defendants' failure to return Western States' share of the settlement proceeds after the checks cleared amounted to a conversion of Western States' funds. This conversion occurred before the bankruptcy petition was filed and before the creditors meeting took place. The defendants have cited no authority to support the proposition that their liability to Western States was affected by Western States' failure to attend the creditors meeting or the discharge of the Irvins' debts by the bankruptcy court. Thus, ~~even if~~ while we recognize that Western States subsequently forfeited its right to recover the amount of its subrogation claim from the Irvins, (see *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992)), it did not forfeit its right to assert a conversion claim against the defendants.

While we recognize that the defendants could have mistakenly believed that they were required to turn over Western States' share of the settlement proceeds to the Irvins, this mistake does not relieve the defendants of their liability to Western States. Attorneys are well-advised to proceed cautiously whenever a client files a bankruptcy petition. However, an attorney is liable to a third party if he wrongfully releases that party's funds to his client. Accordingly, we hold that the defendants' liability to Western States was not vitiated by Western States' failure to attend the creditors meeting or by the discharge of the Irvins' debts by the bankruptcy court.

Because we reverse the trial court's judgment and grant summary judgment in favor of Western States, we need not address the additional

grounds for reversal raised by Western States.

For the foregoing reasons, the judgment of the circuit court of La Salle County is reversed, and summary judgment is entered in favor of Western States.

Reversed.

HOLDRIDGE, P.J., and McCUSKEY, J., concur.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I have set my hand and affix the seal of said Appellate Court at Ottawa, this 2nd day of October in the year of our Lord one thousand nine hundred and ninety-six.

/S/ Gist Fleshman

Clerk of the Appellate Court

C.

The opinion issued by the Appellate Court of Illinois, Third District, on August 29, 1996, and withdrawn on October 2, 1996, after the court modified the same upon on denial of a Petition for Rehearing filed by Defendants Louis E. Olivero & Associates and David Olivero, was delivered by the Honorable Peg Breslin, Presiding Justice, with the concurrence of the Honorable William E. Holdridge, Presiding Justice, and the Honorable Michael P. McCuskey, Justice. The opinion provides as follows:

3-96-0170
Western States v. Olivero

APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa, on the 1st Day of January in the year of our Lord One Thousand Nine Hundred and Ninety Six, within and for the Third District of Illinois:

Present -

HONORABLE PEG BRESLIN, Presiding Justice	x
HONORABLE WILLIAM E. HOLDRIDGE, Presiding Justice	x
HONORABLE TOM M. LYTTON, Justice	
HONORABLE MICHAEL P. MC CUSKEY, Justice	x
HONORABLE KENT SLATER, Justice	
HONORABLE JOHN F. MICHELA, Justice	
GIST FLESHMAN, Clerk	

BE IT REMEMBERED, that afterwards on August 29, 1996 the Opinion of the Court was filed in the Clerk's Office of said court, in the words and figures following viz:

No. 3--96--0170

IN THE APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 1996

WESTERN STATES INSURANCE COMPANY, Plaintiff-Appellant, v. LOUIS E. OLIVERO & ASSOCIATES and DAVID W. OLIVERO, Defendants-Appellees.	Appeal from the Circuit Court for the 13th Judicial Circuit LaSalle County, Illinois No 95 SC 1417 Honorable William R. Banich Judge, Presiding

PRESIDING JUSTICE BRESLIN delivered the opinion of the court:

The plaintiff, Western States Insurance Company (Western States), filed the instant case against the defendants, Louis E. Olivero & Associates and David Olivero, alleging that they wrongfully refused to satisfy Western States' claim for subrogation out of the proceeds of a settlement in a personal injury case. The trial court granted the defendants' motion for summary judgment. We hold that Western States was entitled to receive the amount of its subrogation claim from the proceeds of the settlement and that the defendants' failure to honor the subrogation claim amounted to a conversion of Western States' property. Accordingly, we reverse the court's order and grant summary judgment in favor of Western States.

Western States provided automobile insurance to Gaylon and Judy Irvin. After an automobile accident involving the Irvins and Sharon Gualandi, the Irvins retained the defendants to recover damages from Gualandi. The Irvins settled their claims for a total of $ 20,000. Under

Western States' insurance policy with the Irvins, Western States had a subrogation interest in the suit because it had paid for medical treatment received by the Irvins.

Before the settlement checks were issued, the Irvins executed a release which provided that they would satisfy all liens and claims against the settlement, including Western States' claim for medical payments. The settlement checks were made payable to, among others, the Irvins, Louis E. Olivero & Associates, and Western States. The defendants sent these checks to Western States for its endorsement. The letter which accompanied the checks provided that the defendants agreed to reimburse Western States in the amount of $ 2,005.20, and that a check would be forwarded as soon as the settlement checks cleared. Western States endorsed the checks and returned them to the defendants' office with a demand for payment of $ 2,005.20.

The defendants cashed the settlement checks and deposited the proceeds into a trust account. The checks cleared the bank on May 4, 1995, but the defendants never paid Western States its share of the proceeds. Then, on May 28, 1995, the Irvins informed David Olivero of their intent to file a bankruptcy petition. On June 1, the Irvins' bankruptcy attorney contacted Olivero and advised him not to disburse any of the settlement proceeds because the proceeds were property of the bankruptcy estate. Nevertheless, on the following day, the defendants disposed of the settlement proceeds by retaining $ 9,022.99 in attorney fees and costs and disbursing the remaining $ 10,977.01 to the Irvins. The Irvins did not file their bankruptcy petition until June 20.

In its complaint, Western States alleged, among other things, that the defendants had converted Western States' funds. Both parties filed motions for summary judgment. In granting summary judgment for the defendants, the trial court found that the conversion claim failed because the Irvins maintained control of the settlement proceeds. This appeal followed.

We will confine our discussion in this opinion to whether the trial

court erred by granting summary judgment for the defendants on Western States' conversion claim and by denying Western States' motion for summary judgment.

When parties file cross motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Andrews v. Cramer*, 256 Ill.App.3d 766, 769, 629 N.E.2d 133, 135, 195 Ill.Dec. 825 (1993). On appeal from the entry of summary judgment, the standard of review is de novo. *Andrews*, 256 Ill.App.3d at 769, 629 N.E.2d at 135.

To prevail on a conversion claim, a plaintiff must establish that (1) it has a right to the property; (2) it has an absolute and unconditional right to the immediate possession of the property; (3) it made a demand for possession and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over its property. *Springfield Rare Coin Galleries, Inc. v. Mileham*, 250 Ill.App.3d 922, 620 N.E.2d 479, 189 Ill.Dec. 511 (1993). Retention of property after a valid demand for its return constitutes conversion. *Harry W. Kuhn, Inc. v. State Farm Mutual Automobile Insurance Co.*, 201 Ill.App.3d 395, 559 N.E.2d 45, 147 Ill.Dec. 45 (1990).

In the instant case, the Irvins executed a release which provided that they would satisfy Western States' claim and the Irvins' insurance policy gave Western States the right to recover its medical payments from the personal injury settlement. Moreover, Western States was a named payee on the settlement checks and the defendants promised to pay Western States its share of the settlement amount as soon as the checks cleared the bank. Under these facts, Western States established that it had a right to its share of the proceeds and an absolute and unconditional right to the immediate possession of those proceeds after the checks cleared the bank. Western States made a demand for its share of the proceeds, but the defendants failed to comply with this demand after the checks had cleared. Because it is clear from the undisputed facts that the defendants were authorized to hold Western States' share of the proceeds only until the checks cleared,

the defendants' retention of the proceeds constituted a conversion.

The defendants excuse their actions, however, based upon the rule of professional conduct requiring attorneys to hold all property subject to a dispute (see 134 Ill.2d R. 1.15(a) and (c)). They also argue that they could only dispose of the Irvins' funds if directed to do so by them.

Before the settlement checks cleared, the defendants and the Irvins had recognized their obligation to honor Western States' subrogation claim. Therefore, the fact that Western States was entitled to receive $ 2,005.20 from the proceeds of the settlement checks was not subject to any dispute. In addition, under the Illinois Rules of Professional Conduct, the defendants had an affirmative duty to disburse Western States' share of the settlement proceeds. See 134 Ill. 2d R. 1.15(b). Accordingly, we reject the defendants' argument that the rules of professional conduct limited their duty to return Western States' share of the settlement proceeds.

The defendants also argue that Western States forfeited its right to pursue the subrogation claim by failing to attend a creditors meeting with the Irvins' bankruptcy trustee. They maintain that the amount owed to Western States was a debt which was discharged by the bankruptcy court. We disagree.

The filing of a bankruptcy petition creates an estate comprised of all property in which the debtor has a legal or equitable interest. See 11 U.S.C. § 541(a) (1994). An insurer with a valid subrogation claim has an equitable right to a portion of the debtor's recovery from a third party tortfeasor and the amount of the recovery that represents the costs expended by the insurer does not become part of the debtor's bankruptcy estate. *In re Squyres*, 172 Bankr. 592, 595 (1994). Since both the Irvins and the defendants had previously recognized their obligation to honor Western States' subrogation claim and Western States was a named payee on the settlement checks, the Irvins had no right or interest in Western States' share of the settlement proceeds. Thus, Western States' share of the

proceeds did not become part of the Irvins' bankruptcy estate and Western States was not obligated to attend the creditors meeting. In addition, Western States' subrogation claim was not a debt of the Irvins that could be discharged by the bankruptcy court. See *In re Squyres*, 172 Bankr. 592, 595 (1994).

Moreover, as discussed above, the defendants' failure to return Western States' share of the settlement proceeds after the checks cleared amounted to a conversion of Western States' funds. This conversion occurred before the bankruptcy petition was filed and before the creditors meeting took place. The defendants have cited no authority to support the proposition that their liability to Western States was affected by Western States' failure to attend the creditors meeting or the discharge of the Irvins' debts by the bankruptcy court. Thus, even if Western States subsequently forfeited its right to recover the amount of its subrogation claim from the Irvins, it did not forfeit its right to assert a conversion claim against the defendants.

While we recognize that the defendants could have mistakenly believed that they were required to turn over Western States' share of the settlement proceeds to the Irvins, this mistake does not relieve the defendants of their liability to Western States. Attorneys are well-advised to proceed cautiously whenever a client files a bankruptcy petition. However, an attorney is liable to a third party if he wrongfully releases that party's funds to his client. Accordingly, we hold that the defendants' liability to Western States was not vitiated by Western States' failure to attend the creditors meeting or by the discharge of the Irvins' debts by the bankruptcy court.

Because we reverse the trial court's judgment and grant summary judgment in favor of Western States, we need not address the additional grounds for reversal raised by Western States.

For the foregoing reasons, the judgment of the circuit court of La

Salle County is reversed, and summary judgment is entered in favor of Western States.

Reversed.

HOLDRIDGE, P.J., and McCUSKEY, J., concur.

STATE OF ILLINOIS,)
APPELLATE COURT,) ss.
THIRD DISTRICT,)

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I have set my hand and affix the seal of said Appellate Court at Ottawa, this 29th day of August in the year of our Lord one thousand nine hundred and ninety-six.

/S/ Gist Fleshman

Clerk of the Appellate Court

D.

The written order entered on February 2, 1996, by the Honorable William R. Banich, of Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, Illinois, set forth the following:

THE UNITED STATES OF AMERICA
STATE OF ILLINOIS COUNTY OF LASALLE
IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

Western States Ins. Co.

-vs-

Louis E. Olivero & Assoc. and David Olivero,

Case No.: 95-SC-1417

ORDER

The matter coming before the court on Plaintiff's Motion for Summary Judgment & Motion to Strike David Olivero's Affidavit and on Defendants Motion for Summary Judgment and the court having read the briefs of counsel and heard oral argument and being fully advised in the premises,

IT IS HEREBY ORDERED that:

(1) Plaintiff's Motion to Strike is granted in part and ¶¶s 4, 5 & 7 of the Affidavit of David Olivero are stricken and ¶ 6 is permitted to stand,

(2) Plaintiff's Motion for Summary Judgment is denied,

(3) Defendants' Motion for Summary Judgment is granted.

Dated: 2/5/96 /S/ William R. Banich
Judge

E.

The transcript of the February 2, 1996, hearing in the Circuit Court for the Thirteenth Judicial Circuit, LaSalle County, Illinois, containing the oral arguments on the parties' motions for summary judgment and the ruling by the Honorable William R. Banich on said motions, indicated that the hearing proceeded as follows:

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT

LA SALLE COUNTY, ILLINOIS

WESTERN STATES INSURANCE COMPANY,	)	
PLAINTIFF,	)	
-VS-	)	CASE NO. 95-SC-1317
LOUIS E. OLIVERO & ASSOCIATES AND DAVID OLIVERO,	)	
DEFENDANTS.	)	

TRANSCRIPT OF PROCEEDINGS had in the above-entitled cause on February 5, 1996, before William R. Banich, Associate Circuit Judge of the Thirteenth Judicial Circuit, at the LaSalle County Courthouse, 119 W. Madison Street, Ottawa, Illinois.

APPEARANCES:

Ms. Sheryl Kuzma,
Attorney at Law,
on behalf of the plaintiff.

Mr. David Olivero,
Attorney at Law,
on behalf of the defendants.

REPORTED BY:

Michelle R. Jansz, CSR, RPR
Official Court Reporter
LaSalle County Courthouse
Ottawa, Illinois 61350
License No. 084-002561

(The following are the proceedings had in this cause on February 5, 1996.)

THE COURT: For the record, this is the Western States Insurance Company versus Louis E. Olivero and Associates and David W. Olivero, 95-SC-1417. The petition -- the plaintiff is present, through Counsel. The respondent is present, through Counsel, and pro se, I guess.

I've read both of the briefs and the cases that have been submitted along with the briefs.

Do you have anything that you would like to add?

MS. KUZMA: Well, Judge, one thing, as a matter of housekeeping, I've not filed the original signature page for the affidavit for Denise Last so I would like to submit that as part of the record.

I think the way we need to approach this is first on the motion to strike portions of Mr. Olivero's affidavit, I don't have a lot to add to that motion. I think that the motion is clearly governed by Supreme Court Rule 191(a); that paragraphs 4, 5, 6, and 7 of that affidavit are wholly conclusory.

They are nothing but legal conclusions and I don't know of any more ways I can say that differently and I would ask that those paragraphs be stricken.

THE COURT: Mr. Olivero?

MR. OLIVERO: Judge, in their complaint, they allege legal conclusions and for the purposes of filing an affidavit, obviously, I'm entitled to state whether or not -- in particular, the claim of agency, I think I'm entitled to indicate whether or not I voluntarily agreed to be the agent of Western States or if Western States agreed to be my principal.

I think that there are sufficient facts attached to the affidavit which explain those particular statements that I made concerning agency and contract and things of that nature.

I attached letters, correspondence, other affidavits which I think explain, uhm, in sum and in part, the statements regarding whether I was their agent or whether or not we had a contract and things of that nature.

THE COURT: Anything else?

MS. KUZMA: We're not striking any of those paragraphs that set forth facts. We are only striking the ones that contain legal conclusions.

THE COURT: As to the -- as to this particular motion. I've read the motion. I've read the affidavit. I agree that Paragraph 4, where it talks about whether or not the defendant acted as an agent, is a legal conclusion. Paragraph 4 will be stricken.

Paragraph 5, as to whether or not he exercised control or dominion over the funds, is a legal conclusion. That will be stricken.

Paragraph 7, as to whether or not they entered into a contract, that's a conclusion that the Court has to draw. That will be stricken. That's also

a legal conclusion.

I am going to allow Paragraph 6 to stand. He merely says that he made no false statements. I think that's a fact. Not law.

So the motion will be granted as to those three paragraphs and denied as to the other one.

MS. KUZMA: With respect to our motion for summary judgment, Judge, I won't repeat the facts. I think they are very straight forward.

The defendants in this case could have satisfied their obligations to the plaintiff on May 5th -- or pardon me, May 4th, 1995. They've never done so. They do not have any reason for not doing so.

Defendant raises in his motion for summary judgment, and in response to our motion for summary judgment, this issue about the Irvins' bankruptcy.

I think the three cases that I have submitted to the Court adequately explain that subrogation -- the subrogation interest of an insured does not become part of a bankruptcy estate and cannot be discharged in bankruptcy.

Unless the Court has any questions on that issue, I don't feel the need to repeat what I have said in my brief.

THE COURT: No, I don't need any argument except something that is not in the brief.

MS. KUZMA: Well, in that case, Judge, I really don't have anything additional to add to any of my other claims. Unless Mr. Olivero has something new today, I think my brief, both briefs, set forth the issues very clearly and indicate that judgment should be entered in favor of the plaintiff.

THE COURT: Mr. Olivero?

MR. OLIVERO: Judge, it's a situation where I'm left holding the bag because the check was deposited in a trust account and I think I indicated in my brief the rules of professional conduct which require that to be the case.

And even more so, that's highlighted by the fact that whenever there's a conflict or dispute regarding those funds, they are to remain in that account, such as the situation here.

You know, the plaintiff alleges conversion, but they fail to show where there was a tortuous conversion of the funds. There is every legal justification for the funds to remain in the trust account, until the bankruptcy judge had ruled on the petition for bankruptcy of Gaylon and Judy Irvin.

The claim for agency, Judge, I would point out a letter that was attached as Exhibit 1 to my affidavit, and when I looked at it a little closer this morning, the third paragraph indicates, in no uncertain terms, that Western States never wanted me, nor granted me, any apparent, express or implied authority to act on their behalf.

So I think this goes right to the heart of their claim that I acted as their agent, when they expressly indicated that under no uncertain terms was I ever to act as their agent.

The plaintiff alleges fraud, yet I fail to see where there was a false statement made.

The Irvins had intended to pay their debts and it wasn't only until sometime around May 28th of 1995 that they indicated that they were filing bankruptcy, and turned the matter over to Attorney Stephen West, who indicated to me that the funds should be held in trust until the bankruptcy court was done with their petition.

And I think the reason they alleged fraud was somewhere buried in their brief. They indicate that all this was done I order to suffice -- or satisfy the plaintiff's claim for attorney's fees and costs.

It goes on to hypothesize that if Dr. Judge got paid and if Western States got paid, there wouldn't be a whole lot of money left for the plaintiff, Gaylon and Judy Irvin and their attorneys.

Unfortunately, that's not the law and I'm sure Your Honor is well aware of the law that attorneys' liens are superior, even to Public Aid, even to hospital and medical providers, so the actions on behalf of the Irvins had nothing to do with any motive or attempt to gain more of a fee in this case, because the fees and costs would have come out of this case regardless. And that the entire matter was conducted on behalf of the Irvins, who I owed a fiduciary duty to.

In regards to the position now that Western States takes that the subrogation claim is not dischargeable, I suggest to the Court that that's the position they should have taken back in July, when the bankruptcy petition was presented to the trustee.

That's the exact position they should have been taken to the trustee because there are -- there are a number of good lawyers that have always assumed and taken the position that liens and subrogation claims are set aside with bankruptcy petitions.

That's the position that Attorney Steve West took. That's the position that the trustee, Charles Coffey, took, in the case out of Peoria in front of Judge Altenberger, and I suggest that should have been the position that Western States should have taken back in July.

But instead it is after the fact, it is after the bankruptcy petition has been ruled on and debts discharged that they come into court saying, well, Mr. Olivero, you should have assumed this debt would have been dischargeable even though a good many attorneys don't take that position

and you should have assumed that we are entitled to the two thousand some odd dollars; that we came under our rights of subrogation.

I think looking at the facts in this particular case, Your Honor, based on the affidavit and the chronology of events, I don't think there's anything else that anyone could have done in this particular matter, and I don't think there's criticism that should be pointed in this direction in the handling of this particular settlement.

MS. KUZMA: A few responses. First, with respect to whether or not the bankruptcy has any bearing on this matter, defendants claim we should have taken this matter to the trustee. We had no obligation to take this matter to the trustee because the Irvins didn't have the money. The money was deposited with the defendants in this matter.

Now, I know the defendants claim that they rely on the opinion of other attorneys, but what they should have done is relied upon published decisions that are directly on point, including one decided barely two years ago, in the central district of Illinois. That plainly states that a bankruptcy of an insured does not discharge the subrogation interest of the insurer.

With the respect to the conversion claim, he makes this argument in his brief and brings it up again this morning -- or this afternoon that the Rules of Professional Conduct prohibited him from distributing the funds.

That's a complete red herring. He could have distributed these funds on May 4th, 1995, which is when the checks cleared the bank, and at that time, there was no dispute at all whatsoever about the amount owed to Western States.

Now, there's some sort of suggestion in his argument that they had to wait to itemize their cost and fees. They didn't need to do that with respect to Western States. We knew exactly how much was owed and it could have been paid on May 4th, 1995.

There was no justification for a ruling from the bankruptcy court because, of course, as I've already pointed out, the -- this money never became part of the bankruptcy estate.

With regard to his argument that there was no agency relationship here, he does point out a letter of February 28, 1991, but you'll also note that attached as Exhibit C to Denise Last's affidavit is a letter to the law firm that says we were and have been for quite sometime under the assumption you were also protecting our interest in the medical payment subrogation.

Also, the letters of April '95 clearly demonstrate that the defendants did take on a position of agency that superseded any prior agreements between the parties.

With respect to the fraud argument, he says there's no false statement. The false statements are very clear. They promised to pay us the money, when the checks clear. They didn't do it. There's no reason given why they didn't do it. There's no reason why we needed to wait for an itemization and I think this Court, looking at this record, can see that the only reason was to protect their fees. At the time they negotiated this settlement, they negotiated a settlement that left less than $2500 to be applied to fees, costs, and then a little something left over for the insureds.

I think it's clear why they waited in this matter. They waited until they could get paid, at the expense of the other parties, including Western States.

The breach of contract argument isn't even attacked by the defendant this afternoon. And, again, I would just ask that judgment be entered in our favor and against the defendants.

THE COURT: Anything else, Mr. Olivero?

MR. OLIVERO: No, Your Honor.

THE COURT: First of all, as far as the issue of whether or not a subrogation claim can be discharged in bankruptcy, it doesn't really seem to be the issue in this case. What seems to be the issue is who had the responsibility to make those claims, once the bankruptcy was filed.

The -- Counsel cites a central district case that holds that they are not dischargeable and implies that it was the responsibility of the defendant to go in and make that claim before the bankruptcy court.

That gets us into the other questions in this case, particularly the questions -- the question of agency and the question of contract to determine wherein this obligation arose.

I was a little -- in reading the briefs and in hearing argument today, there's some issue now being raised that I didn't -- and I may be wrong, I didn't see it in the briefs, as to the distribution of the funds and when it took place and whether they could be done earlier.

I don't know that that particular issue was properly raised in the complaint. I presume the failure to -- that there's an allegation that it was negligence on their part not to release the funds at an earlier date. I don't see a negligence count in the complaint, or any count in the complaint that raises the issue of when the funds -- or why the funds were not released, when they cleared the -- when the checks cleared the bank.

That is not a part of any of the four counts. There's a count on conversion, count of breach of a fiduciary duty, fraud, and contract. There's no negligence complaint to say that -- the next count that says that they should have released the funds earlier and had they released the funds earlier, the plaintiff in this case would not have been damaged. It's not raised in the pleadings, nor, as I say, could I find it anywhere in the briefs and argument on the summary judgment.

It is part of the facts, as to when all these things happened, but it has subsequently not been raised.

So as to the petition as it stands right now, Count I relates to conversion. As is stated in the briefs, the elements of a conversion claim are set forth in the Springfield Rare Coin Galleries Incorporated case --

THE REPORTER: Say that again.

THE COURT: The Springfield Rare Coin Galleries Incorporated case -- got it?

And all four of the elements have to be -- have to be present or must be met in order for a conversion claim to exist.

The first element requires control, dominion, or ownership; the unauthorized or wrongful assumption of same over the personal property of another.

That element has several facets, the first is the personal property of another, which is what we have here. We have to have control, dominion, or ownership and that control, dominion, or ownership has to have been assumed wrongfully.

As I said, we have -- we have the element of -- it is the personal property of another. The problem I have is with the second requirement as to whether or not the defendants had ownership or dominion or control over these funds.

Clearly, defendant did not have ownership or dominion. Dominion is -- I found, by looking for a definition of dominion, is absolute ownership. So that almost seems redundant, ownership or absolute ownership.

The question then remains, he, obviously, did not have ownership nor did he have dominion. Did they have control? And I think the answer to that is quite clear that they had no control over the funds.

It is clear that the control of the funds remained with the client of the defendants. To hold otherwise, would be to require the defendants to, in fact, exercise control over these funds, which is a violation of the Code of Professional Responsibility.

If he acted on his own, with respect to the clients' property, in any way, he would have been in violation of the code.

Consequently -- or subsequently, if he had acted after notice of the bankruptcy, he would have been in violation of the Bankruptcy Act.

Based upon that, this Court finds that he did not have control, dominion, or ownership -- they did not have control, dominion, or ownership over the personal property and thus the count for conversion has failed and motion for summary judgment filed by the defendants will be granted.

The motion filed by the plaintiff will be denied.

The second count is a count concerning a breach of a fiduciary duty. In order to have a fiduciary or agency relationship, the plaintiff has to be able to control the defendants' actions. Plaintiff argues that since they had to endorse the checks, they were controlling the defendants' conduct. In other words, they had to take an action or do something in order to allow the defendant to act.

Doesn't necessarily mean that they were controlling his conduct. What was happening in this case is there was a settlement being effectuated. The question, in my mind, is does the plaintiff's attorney become the defendants' agent in every personal injury case since the defendant, if a case is resolved or settled, has the obligation to draw the check?

The plaintiff's attorney cannot act until the defense -- defendants' attorney or the defendant draws the check. Does that then make them their

agent or in a fiduciary capacity? The duty owed by the defendant in this case was to his clients.

And his clients, under the -- again, under the Code of Professional Ethics, controlled his actions. He was clearly not an agent or in any fiduciary relationship with Western States, based upon the comments made in the letters because they had -- he can't serve two master. He was -- the control of those funds were his clients' right. His clients had the right to instruct him as to the negotiations and to direct what would happen with the funds.

Based upon that, as to Count II, the defendants' motion for summary judgment will be granted and the plaintiff's motion for summary judgment will be denied.

I'm going to skip over to Count IV, which is a breach of contract count. N order to prove a contract, with the defendant, the plaintiff must show that the agreement complies with all the elements as set forth in the Sutherland versus Illinois Bell case that was cited in the briefs.

The first requirement is -- is evidence of a contract between the parties. Throughout this case, it's clear from the facts, which are not in controversy, the defendants were acting as an agent for their clients. The plaintiff was at all times aware that he was acting as an agent for the clients and who those clients were.

So if you want to go back to agency law, the defendant was acting as an agent for disclosed principals. Agency law provides that if the principals are disclosed to the other party, the agent cannot be considered a party to the contract.

Contract is not enforceable against the agent because the party dealing with the agent at all times knew who the -- who the principals were. They were disclosed. They weren't undisclosed principals. It wasn't a situation where they didn't know who they were dealing with since he was an agent

or they, he and the law firm, were agents for disclosed principals.

There can be no contract -- breach of contract case. There can be no contract between him and Western States Insurance as the contract with Western States Insurance is between those people to whom they provided the payments; that being the defendants' clients and Western States.

The -- again, the plaintiff's motion for summary judgment will be denied and the defendants' motion for summary judgment will be granted.

As to the final count in the petition, that is the count which accuses the defendants of fraud. There's -- the mere falsity of the statements made is not the only issue to be determined in any fraud count.

There has to be a false statement of material fact and there has to be knowledge or belief of the falsity by the party making it.

The plaintiff has argued, and cited cases, that circumstantial evidence may be used to predicate a summary judgment so long as no other conflicting inference can be drawn, or that any conflicting inference would be unreasonable or speculative.

In this case, the inference that the plaintiff wants the Court to draw is, in my mind, the speculative and unreasonable one.

The factual situation is quite clear. No one disputes those facts. What the plaintiff has not explained in their argument or in their brief is how the inference -- why the inference that they want me to draw is so clear.

What is clear is that a substantial amount of time was spent herein trying to resolve the original -- the defendants' clients' claims.

What the plaintiff wants me to believe is that I should look at these dates and say, well, you can infer reasonably from these facts that Mr.

Olivero and his law firm knew all along that the clients were going to go and file bankruptcy. They knew it. They just didn't tell us. They went through this whole charade. They sent us letters making the false statements, that we would be paid, knowing that we wouldn't be paid. In other words, knowing that it was the intention of his clients all along to go bankrupt.

If that was their intention, then I wonder why they bothered for so long to negotiate. Why bother to negotiate the claims down if Mr. Olivero knew there was going to be a bankruptcy?

Wouldn't it have been in his clients' much better interests to say fine, tell them you will pay them the whole amount that you owe them. Tell them that you will pay them -- I believe it was a two-thirds recovery, or approximately two-thirds. Pay them the whole $3300 that you owe them. You're going to file bankruptcy anyway. You are going to have to pay them. We'll send them the check. Sign it. Come back and you file bankruptcy.

I find that inference much more speculative an unreasonable than the one that is being touted -- that is being argued by the defendants; that being that they didn't know. That seems to me to be the reasonable and nonspeculative inference from what happened in this case.

We also have uncontroverted evidence, other than by inference, I guess, or argued inference, reasonable inference, that being the affidavit of Mr. Olivero as to exactly when things happened and when he found out they intended to file bankruptcy.

Now, this case, for a small claims case, this Court has allowed an awful lot of discovery. The Court has allowed an awful lot of time to be spent. If we were concerned about the accuracy of those statements, it's been -- it's been submitted by an affidavit. There's no counteraffidavit to his knowledge. And what he says in his affidavit makes sense based upon the logical, reasonable, nonspeculative inference from the factual situation;

that he did not know, that he was not a party to this. This wasn't a -- a determination on his part to try to defraud western States Insurance by promising them the money when it wasn't forthcoming.

It seems to me that with the affidavits and what this Court views as the reasonable inference to be drawn from the circumstantial evidence, that the defendants --both of which, to this Court's mind, or the defendants knew absolutely nothing about the impending bankruptcy, when they wrote those letters and effectuated, on behalf of their clients, and as agent for their clients, an agreement with Western States.

And based upon that, on Count III, which is the fraud count, the motion for summary judgment, filed by the plaintiff, will be denied and the motion for summary judgment, filed by the defendant, will be granted.

Now, as I said, the first time we've heard any question about the issue of whether or not they acted with all due dispatch to get the checks issued, once the original check from the defendant in the Work Comp case had been issued -- or, I'm sorry, it was a personal injury action, from the defendant, in the personal injury action was issued, that was not raised in the pleadings and it was not raised until today when the argument was made it could have been distributed days earlier.

Now, I don't think that's a question of conversion or of a breach of a fiduciary duty or of breach of contract or of fraud. That may be a question of negligence on their part, in their actions, but that wasn't raised in the pleadings, nor in the motions.

So, as to the four counts that are in existence, the motions of the defendant for summary judgment are granted and the motions of the plaintiff are denied. If you will prepare an order.

(Which were all the proceedings had in this cause on this date.)

STATE OF ILLINOIS)
)
COUNTY OF LASALLE)

I, Michelle R. Jansz, an Official Court Reporter in the Thirteenth Judicial Circuit of the State of Illinois, County of LaSalle, do hereby certify that I reported in machine shorthand the proceedings had in this cause; that I thereafter caused the foregoing to be transcribed into text, which I certify to be an accurate transcription of my shorthand notes of the proceedings in this cause had before William R. Banich, Judge of said court.

/S/ Michelle R. Jansz
Michelle R. Jansz, CSR, RPR
Official Court Reporter

Dated this 21 day of February, 1996.